

CHRISTINE A. VARNEY (*pro hac vice*)  
cvarney@cravath.com  
KATHERINE B. FORREST (*pro hac vice*)  
kforrest@cravath.com  
GARY A. BORNSTEIN (*pro hac vice*)  
gbornstein@cravath.com  
J. WESLEY EARNHARDT (*pro hac vice*)  
wearnhardt@cravath.com  
YONATAN EVEN (*pro hac vice*)  
yeven@cravath.com  
LAUREN A. MOSKOWITZ (*pro hac vice*)  
lmoskowitz@cravath.com  
**CRAVATH, SWAINE & MOORE LLP**  
825 Eighth Avenue  
New York, New York 10019  
Telephone: (212) 474-1000  
Facsimile: (212) 474-3700

PAUL J. RIEHLE (SBN 115199)  
paul.riehle@faegredrinker.com  
**FAEGRE DRINKER BIDDLE & REATH LLP**  
Four Embarcadero Center  
San Francisco, California 94111  
Telephone: (415) 591-7500  
Facsimile: (415) 591-7510

*Attorneys for Plaintiff and Counter-defendant  
Epic Games, Inc.*

**UNITED STATES DISTRICT COURT**  
**NORTHERN DISTRICT OF CALIFORNIA**  
**OAKLAND DIVISION**

EPIC GAMES, INC.,  
*Plaintiff, Counter-defendant,*  
v.  
APPLE INC.,  
*Defendant, Counterclaimant.*

Case No. 4:20-CV-05640-YGR-TSH

**DECLARATION OF J. WESLEY  
EARNHARDT IN SUPPORT OF  
PLAINTIFF EPIC GAMES, INC.'S  
OPPOSITION TO DEFENDANT APPLE  
INC.'S MOTION FOR AN ADVERSE  
CREDIBILITY FINDING**

The Honorable Yvonne Gonzalez Rogers

1 I, J. Wesley Earnhardt, declare as follows:

2 1. I am an attorney licensed to practice in the State of New York and admitted to  
3 appear before this Court *pro hac vice* in *Epic Games, Inc. v. Apple Inc.*, Case No. 4:20-cv-05640-  
4 YGR-TSH. I am a partner at the law firm of Cravath, Swaine & Moore LLP and am one of the  
5 attorneys representing Epic Games, Inc. (“Epic”) in the above-captioned action.

6 2. I submit this declaration in support of Epic’s Opposition to Apple Inc. (“Apple”)’s  
7 Motion for an Adverse Credibility Finding in this matter. (ECF No. 602.) The contents of this  
8 declaration are based on my personal knowledge except as to matters stated on information and  
9 belief. As to those matters stated on information and belief, I am informed and believe them to be  
10 true. If called to be a witness, I could and would testify competently to the contents of this  
11 declaration.

12 3. A true and correct copy of excerpts from the transcript of the trial in this matter is  
13 attached hereto as **Exhibit A**.

14 4. A true and correct copy of excerpts from the transcript of the deposition of  
15 Lori Wright in this matter, conducted on April 16, 2021, is attached hereto as **Exhibit B**.

16 5. A true and correct copy of Apple’s Rule 26(a)(1) Initial Disclosures, served on  
17 October 12, 2020, is attached hereto as **Exhibit C**.

18 6. A true and correct copy of Apple’s Subpoena to Microsoft Corporation  
19 (“Microsoft”), dated November 6, 2020, which was sent to Epic on November 3, 2020, is attached  
20 hereto as **Exhibit D**.

21 7. A true and correct copy of Epic’s document subpoena to Microsoft, dated  
22 December 2, 2020, is attached hereto as **Exhibit E**.

23 8. A true and correct copy of Apple’s Notice of Declarations of Authenticity of  
24 Business Records Pursuant to Federal Rule of Evidence 902(11) & 902(14), dated May 1, 2021,  
25 which has been excerpted to remove declarations from third parties not implicated by this motion,  
26 is attached hereto as **Exhibit F**.

27 9. A true and correct copy of Epic’s Tentative Initial Witness List, served March 12,  
28 2021, is attached hereto as **Exhibit G**.

10. A true and correct copy of a document produced by Microsoft in this litigation bearing Bates number MSFT\_EPIC\_00008040 is attached hereto as **Exhibit H**.

11. A true and correct copy of a document produced by Microsoft in this litigation bearing Bates number MSFT\_EPIC\_00008041 is attached hereto as **Exhibit I**.

**EPIC'S PURSUIT OF DOCUMENT DISCOVERY FROM MICROSOFT**

12. On December 2, 2020, Epic served the document subpoena attached hereto as Exhibit E on Microsoft.

13. After serving Epic's document subpoena on Microsoft, counsel for Epic met and conferred with counsel for Microsoft regarding the scope of Microsoft's document production in response to Epic's subpoena.

14. During those meet and confer sessions, counsel for Epic requested, consistent with its subpoena, that Microsoft produce documents regarding Microsoft's Windows 10 in S Mode; reports, statistics and projections for the xCloud business; and documents concerning Apple's refusal to allow Microsoft's xCloud app on the App Store.

15. In response to Epic's subpoena, Microsoft did not produce documents regarding Microsoft's Windows 10 in S Mode; reports, statistics and projections for the xCloud business; or documents concerning Apple's refusal to allow Microsoft's xCloud app on the App Store.

16. Apple has produced in this litigation certain email communications between Microsoft personnel, including Lori Wright, and Apple personnel regarding Microsoft's xCloud game streaming service, including, among others, the documents beginning with Bates numbers: APL-EG\_00007947 (PX-2311), APL-EG\_02785080 (PX-2342), APL-EG\_04979944 (PX-2360), APL-EG\_04981492 (PX-2361), and APL-EG\_06983915 (PX-2380).

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct and that I executed this declaration on May 12, 2021, in Westchester County, New York.

/s/ J. Wesley Earnhardt  
J. Wesley Earnhardt